APPEAL NO. 010598

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 5, 2001. With respect to the single issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. F did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because it was timely disputed on the respondent's (claimant) behalf by her treating doctor. In its appeal, the appellant (carrier) contends that the hearing officer's determination that the treating doctor's letter was sufficient to serve as a dispute to the first certification of MMI and IR is against the great weight of the evidence. In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The facts in this case are largely undisputed. The parties stipulated that the claimant sustained a compensable injury on _____; that on May 3, 2000, Dr. F certified that the claimant reached MMI on November 30, 1999, with an IR of zero percent; that the claimant first received written notice of Dr. F's certification of MMI and IR on May 15, 2000; and that the Texas Workers' Compensation Commission (Commission) received a letter from Dr. M, the claimant's treating doctor, on June 1, 2000. The claimant testified that when she received Dr. F's certification, she took it to Dr. M's office and discussed it with her. She stated that in the course of the conversation both she and Dr. M expressed their disagreement with Dr. F's MMI date and his zero percent IR and that Dr. M agreed to dispute the certification on her behalf. In a letter dated May 22, 2000, addressed to the carrier and copied to the Commission, Dr. M noted that the claimant had brought Dr. F's report in for review and discussion. Dr. M stated that "I find the report and [Dr. F's] opinions not only unethical and grossly incorrect, but fraudulent as well." In addition, Dr. M stated that "I will also be requesting that [the Commission] disregard the remarks and opinions made by Dr. F, not only in this case but also possibly in all cases."

The hearing officer determined that Dr. M's May 22, 2000, letter, which was received by the Commission on June 1, 2000, was a timely dispute on behalf of the claimant by her treating doctor, Dr. M. In its appeal, the carrier does not argue that Dr. M was not acting on behalf of the claimant; rather, it contends that the language in Dr. M's letter was insufficient to convey a meaningful dispute of the certification of MMI and IR. The carrier characterized Dr. M's letter as an "assault" on Dr. F's character and his opinions; however, it argues that it was not an effective dispute of the MMI date and IR because the letter does not identify the MMI date or the IR as one of Dr. F's opinions with which Dr. M and the claimant disagreed. We find no merit in this assertion. The principle opinion expressed by Dr. F in his report was that the claimant had reached MMI on November 30, 1999, and had a zero percent IR. Given the significance of a certification of MMI and zero percent IR, we are hard-pressed to accept that an insurance adjuster receiving Dr. M's letter would

not have realized that it expressed a dispute of and disagreement with Dr. F's certification. Nothing in our review of the record demonstrates that the hearing officer's determination that Dr. M's letter was a timely dispute of Dr. F's certification of MMI and IR is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, the hearing officer properly determined that Dr. F's certification did not become final pursuant to Rule 130.5(e). We note that Rule 130.5(e) has been declared invalid by the Third Court of Appeals. Fulton v. Associated Indem. Corp., 2001 WL 359622 (Tex. App.-Austin, April 12, 2001). On April 23, 2001, the Acting Executive Director of the Commission issued Advisory 2001-05 which states that the Fulton decision "should not be considered as precedent at least until it becomes final upon completion of the judicial process."

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge